PUBLIC PROSECUTOR

v.

TAN AH KHONG & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
KC VOHRAH J
[FT CRIMINAL TRIAL NO. 17 OF 1983]
11 DECEMBER 1986

CRIMINAL LAW: *Drug offence - The accused were passengers in a car - Packets containing heroin were found in the front car seat - The driver escaped - Whether the accused had possession of the heroin.*

The accused were charged jointly for trafficking in 182.17 grammes of heroin, a dangerous drug under s. 39B of the Dangerous Drugs Act, 1952. The police acting on a tip-off ambushed a car in which the accused were passengers. The driver of the car escaped. The drugs were found in two packets in the front seat of the car where the second accused was seated. His version was that when the police identified themselves, the driver took out the two packets from under his seat and told him to throw the packets out. The first accused was seated in the back seat. The second accused had refused to make a statement to the police after he was arrested.

Held:

[1] There was no evidence that the first accused had tried to escape or that he was in possession of the heroin. He was acquitted and discharged.

[2] The second accused was called to make his defence as there was some evidence that he had custody and control over the two bags containing heroin. He was deemed to have been in joint possession of the heroin under s. 37(d), Dangerous Drugs Act, 1952. The second accused's version was probable. He was acquitted and discharged.

[3] No adverse inference could be drawn from the second accused's refusal to make a statement to the police after his arrest. He had a right to refuse to make a statement under s. 37A, Dangerous Drugs Act 1952.

[First and second accused acquitted and discharged.]

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37(b), (d), 37(da)(i), 37A(1)(b), 39B
Evidence Act 1950, s. 145.
Penal Code, s. 34.

For the public prosecutor - Nor Afizah Hanum, DPP
For the first accused - Americk Singh Sidhu; M/s. Khoo & Sidhu
For the second accused - Sidney Augustine; M/s. Sidney Negrin & Co.

JUDGMENT

KC Vohrah J:

The two accused were charged that they jointly **with another still at large,** in furtherance of a common intention, under s. 34 of the Penal Code -

On 18 March 1983 at about 1.05 a.m. at Tepian Jalal Loke Yew in the City of Kuala Lumpur, in the Federal Territory, did traffic in a dangerous drug to wit heroin a total weight of 182.17 grammes on your own behalves, and that you have thereby contravened the provision of para. (a) of sub-section 1 of s. 39(B) of the Dangerous Drugs Act 1952 and punishable under sub-section (2) of the same s. 39(b) of the said Act (Revised Act 234/80).

Inspector Megat Mohd. Aminuddin (PW2) received instruction from ACP Hashim (PW7) (who confirmed it to be so) to stage an ambush at a side road near Jalan Loke Yew, commonly known as "Tepian Jalan Loke Yew", on 17 March 1983 on car JAS 9386. ACP Hashim had received information that the vehicle, a Mazda 626, with 3 male Chinese, were bringing drugs into that road.

Inspector Megat together with 5 police personnel went to Tepian Jalan Loke Yew at about 8.30 p.m. It was a fairly broad road with shophouses on either side. At one end of the road was a drain which was at right angles to it. The police team waited at the scene. At about 1 a.m. the next day Inspector Megat saw a car enter the road. It was a Mazda 626 and it bore registration No. JAS 9386. This car stopped almost halfway along the road. Its engine was running and it had its headlights still switched on. Inspector Megat and his men came out of their ambush positions and ran towards the car and shouted "police". The car then sped off and the ambush party gave chase. Inspector Megat then saw the driver of the car open the door of the car and jump out before the car hit the drain at the end of the road and getting stuck in it. Two police personnel, Detective Corporal Kabri and Detective Ruslan, chased the driver to no avail.

Inspector Megat and Detective Corporal Teoh (PW8) went to the front left side, the passenger side, of the car. Detective Corporal Teoh arrested the person who was found in the front passenger seat. This person was the second accused. Inspector Megat found a pink plastic bag containing two plastic packets on this front passenger seat. These two plastic packets held a granular substance which Inspector Megat suspected to be heroin.

The first accused was found in the back seat, sitting behind the front passenger seat. Detective Corporal Tan (PW6) was the one who arrested him.

All these facts except for the evidence that the driver jumped out of the car, were basically uncontroverted primary facts supposedly impliciting the first and second accused with the two plastic packets of what was suspected to be heroin.

The substances in the two packets were analysed by Mr. Khoo Ah Kow who found the substances to contain heroin. Mr. Khoo conducted various tests and analyses to ascertain the nature and weight of the substance. Through these tests and analysis including the specific analysis using the gas chromatography mass spectrometry Mr. Khoo was positive that the granular substances contained heroin. Through his analysis he found the heroin content of the granular substance to be 182.17 grammes of heroin. I was satisfied with Mr. Khoo's evidence on both counts. To my mind no question of inadmissibility arises when considering Mr. Khoo's evidence. It is a question of weight which I should attach to his evidence. And I accept his evidence on both counts as stated.

At the close of the case for the prosecution, what was established in regard to both the accused was that two packets containing a total of 182.17 grammes of heroin were found in car in which both the accused were passengers.

As regards the offence of trafficking in the heroin, I was however unable to find any evidence against the first accused who was seated in the back seat of the car. No doubt the car sped away when the police stopped it but the second accused was not the driver of the car. The

drug was not found on him or near him. No doubt, too, the back door of the car near to him was found opened by Detective Corporal Tan (PW6) but that is a neutral fact. There was no evidence that he tried to run away or that he struggled before he was handcuffed. The mere fact of the door being opened does not indicate guilty knowledge. In my view there was nothing incriminating adduced in evidence regarding his conduct in relation to the drug found in the car or in regard to the second accused or to the driver who escaped. And of course I cannot rely on the highly prejudicial evidence that information was received that car JAS 9386 with 3 passengers would carry drugs. There being no evidence of control or custody of the dangerous drug by the first accused or by him in concert with others I therefore acquitted and discharged him.

As regards the second accused the evidence was that he was seated in the front passenger seat and the plastic bag (P9) was found in that seat by Inspector Megat. Inspector Megat in fact before the accused was arrested saw the plastic bag beside the accused. On an *ex facie* basis the second accused was not only in close proximity to it, he must have been aware of the bag - he clearly had access to it and he could exercise control over it. Taking all these into consideration and the fact that the driver of the car had run away indicating the latter's criminal knowledge of the bag and what it contained, to my mind there was some evidence that the accused, with the driver, had custody and control over the plastic bag and its contents and therefore under s. 37(d) he was deemed to have been in joint possession of the dangerous drug and to have known the nature of the dangerous drug. And under s. 37 (da)(i), the weight of the heroin being 182.17 grammes, he was deemed to have trafficked in the drug.

Accordingly I called the second accused to make his defence on the charge, amended to the extent that he was not jointly charged with the first accused but with another person still at large for the offence of trafficking as in the original charge.

The second accused elected to give his evidence on oath. He did not deny that the police stopped the car, that the car sped off, that the driver, Jimmy, jumped out, and that a plastic bag was found beside him. He however denied possession of the plastic bag. And he denied knowing what it contained. He said that Jimmy drove off the car on hearing "police" being shouted. Jimmy then bent down and took a packet from underneath the drivers's seat with his left hand and put it on the second accused's seat shouting "throw! throw! throw!". And Jimmy jumped out and escaped. The car crashed into the drain.

The second accused recounted the events leading to his being in Jimmy's car. The second accused said that he had befriended the first accused some months before their arrest in Johore Bahru. They had frequented a coffee shop in the mornings and had become friends. The second accused had a lady friend in Klang who intended to start a unisex hair saloon in Klang and since he was a "decorative" carpenter he decided to help this girl. He said that the first accused, Tan, who sold and repaired air conditioners had said that he wanted to follow him to Klang as he could get some business fixing air conditioners in his lady friend's saloon. At that meeting between the two accused, Jimmy was present and Jimmy said he was going to Kuala Lumpur on 17 March 1983. Jimmy turned down the request of both of them to be given a lift. Jimmy said he had already 4 passengers. However on 17 March 1983 the first accused went to see the second accused and told him that Jimmy was going to Kuala Lumpur way and that Jimmy could give a lift to both of them. They agreed to pay Jimmy the petrol expenses. The three of them left Johore Bahru at past 8.00 p.m. on that day. The second accused said that 1 hour after leaving Johore Bahru he dozed off. He was awakened by Jimmy after which he woke up the first accused, Tan. This was 5 to 10 minutes

before arrival at the scene and their arrest.

Tan, DW2, who said he sat in the back seat of Jimmy's car gave substantially the same story that the second accused gave. On the crucial aspect of possession of the drugs, he said that there was no plastic bag on the seat throughout the journey from Johore Bahru to Kuala Lumpur. He said that after the motor-car had sped off when the police had rushed to the car, he saw Jimmy bend downwards. He could not see what Jimmy was doing but he heard some noises as if he was searching for something. Then he heard Jimmy shout "throw! throw! throw!" The car was still moving and then Jimmy opened the door and jumped out of the car.

Before I examine the defence I would like to state that the learned DPP tried to cross-examine the second accused as to whether after he had been administered a caution (presumably under s. 37A of the Dangerous Drugs Act 1952) he gave a statement to the police. I asked her what the purpose of her question was. She said that the accused in fact declined to give a statement after the caution had been administered and she wanted to show that if indeed the story given by the second accused in Court is true he could have given it as a cautioned statement. I disallowed the question as being irrelevant and as being prejudicial to the accused. When the time for submissions came, after defence has closed its case, the DPP applied again to cross-examine the second accused on the same matter and she relied on s. 145 of the Evidence Act 1950. To my mind the refusal of the second accused to say anything after his arrest is a legitimate refusal (if indeed there was a refusal). This right to refuse arises under para. (b) of the proviso to s. 37A of the Dangerous Drugs Act 1952 and to allow cross-examination to show that a person refused to answer after the caution was administered and thus allowing for an adverse inference to be drawn against that person is to negate the effect of the provision of law. The law gives him a right to remain silent and it is wrong for the Court to infer that such silence is incriminating. I disallowed the application of the DPP.

I viewed the defence in the totality of the evidence adduced. My finding at the close of the prosecution's case was that the second accused was seen by Inspector Megat to be sitting in the front passenger seat with the plastic bag beside him before he was arrested. There was therefore some evidence of control or custody of the plastic bag. The evidence of the second accused and his witness was that it was not there during the journey and the second accused said that it was put there before Jimmy jumped out of the car. The story is not improbable. Why would one travel in a car with the bag of dangerous drugs blatantly exposed on the front passenger seat? Why take the risk of detection in case of police patrols or police or customs road blocks? Strangely too, with so much space in the Mazda 626 why was it necessary to keep the packet next to a passenger or inconvenience him all the way from Johore Bahru to Kuala Lumfour, a journey of at least five hours? There was believable and unchallenged evidence that the second accused slept for most of the journey - why have the packet next to him, inconveniencing his rest? If it was not meant to be secreted it could have been kept anywhere in the car apart from the seat which the second accused occupied. But the point is that the bag contained dangerous drugs. Surely it could have been secreted in the glove compartment, underneath the seats and anywhere else where it was safe from prying eyes. Thus the evidence of the second accused that Jimmy, before he jumped off, had bent over (and this was borne by the evidence of DW2) and with his left hand had taken the bag from underneath his seat is probable and believable. Jimmy according to the second accused then placed it by his side and shouted, "throw! throw! throw!" DW2 heard the shouts. The second accused said that immediately after that Jimmy opened the door and jumped out. It is in evidence indeed that Jimmy did jump out of the car and escape.

It was he who drove the car forward when the police party rushed at him. It is clear therefore that Jimmy had knowledge of the dangerous drugs in the bag. Is it not possible that Jimmy alone knew of the dangerous drugs and that is why he alone took steps to escape and indeed escaped, while the others did not? It has been argued by the learned Deputy Public Prosecutor that since Jimmy intended to escape and in fact Jimmy did escape, it was foolish for him to have to take out the packet from under his seat and expose it. But what if he could not tell whether he had time to escape? Then the bag under his seat would have definitely incriminated him if he had stayed on. Who is to tell why he jumped? Could it have been that he jumped because the second accused did not respond when Jimmy, in relation to the bag, shouted, "throw! throw! throw!" The Court does not know what Jimmy's reasons were but where other reasons which are favourable to the defence can be drawn it would not be justifiable to draw a reason advanced by the prosecution which is unfavourable to the defence merely to bolster its case.

There was evidence that Detective Corporal Teoh slammed shut the nearside front door when he saw it being opened by the second accused before he arrested him. But the opening by the second accused came about when the car had got stuck in the drain. The opening of the door is a neutral fact. It could have shown guilty knowledge. It could have been perfectly normal behaviour on the part of the second accused after finding the car stuck in the drain, to open the door and come out.

One other matter which I found puzzling. From the first time the car was stopped up to the time the car got stuck in the drain, if the accused knew of the nature of the dangerous drug and there must have been ample time since there was enough time for Jimmy to open the door and jump out - the second accused could have picked up the bag beside him and thrown it elsewhere in the car or out of the car to distance himself from the bag. Why was this not done? Is it not consistent with his defence that he did not know the nature of the drug? To my mind it is probably so and that lends credence to his story that when Jimmy shouted, "throw! throw! throw!", after he had placed the bag beside him, it did not occur to him to throw it away as it was not his belongings.

Considering the totality of the evidence, to my mind, on a balance of probabilities, the ingredient of possession on the trafficking charge against the second accused has not been made out. I therefore acquit and discharge the accused.

Also found at [1988] 1 CLJ 835